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THE CONDUCT OF THE GUITEAU TRIAL.

THE assassination of the chief magistrate of the nation, without any provocation, and without any motive that intelligent minds can view in any other light than of the utter and reckless depravity of the culprit, or his insanity, has naturally made the trial of Guiteau a *cause célèbre* in the annals of jurisprudence. Every step and incident in the trial has been reported and exposed, from day to day, to the perusal and comment of the people in every country in which newspapers exist. Much has been stated concerning the conduct of the eminent judge who presided at the trial that had no foundation in fact, and many of the incidents of the trial which have tended to rob it of the austere and solemn dignity suitable to such an occasion have been greatly exaggerated. Some portion of the press of this and other countries, distant from the scene, have caught the infection of exaggeration, and, magnifying and distorting occurrences sufficiently unpleasant in themselves, have derided the whole progress of the trial, as bearing the character of a low and disgraceful farce. But, denuded of all fictitious reports, and of all exaggerations designed, like theatrical colorings, to feed and sharpen the appetite for ridicule and sensation, there was more than enough of what was really derogatory to the due and dignified administration of justice to demand an inquiry how such scenes can be prevented in a trial for felony, if they can be prevented at all.

From day to day, in a trial that lasted for many weeks, the prisoner, by insolence and contempt toward the Court, by impudent interruptions of counsel, by ribald and vulgar epithets, and infinite and irrepressible garrulity, taxed the endurance of the Court and jury to the uttermost, greatly prolonging the trial and lowering, so far as such conduct under such circumstances could, the character of one of the greatest of judicial proceedings, and doubtless producing in the public mind something of contempt for one of the most essential and interesting of all processes of good government, namely, the calm and orderly administration of justice.

But American pride may, perhaps, find some solace for its mortification in the fact that occurrences of this nature have sometimes happened in the courts of other civilized countries. In Mr. Craik's report of the trial, in England, of Colonel Turner, for burglary (1664), it is stated that "the judge with his indecent wipes and the prisoner with his irrepressible impudence were well matched." A perusal of the report, we think, fairly justifies the conclusion of the reporter. In the trial of Sir Nicholas Throckmorton, in the same country, for treason, there was a constant war of epithet and accusation between the prisoner and the prosecuting counsel and the judge, but no step was, or apparently could be, taken to prevent it without stopping the trial, although the judges threatened to deal with the prisoner—without saying how—if he persisted. He did persist, and got a just verdict of acquittal, for which the judges revenged themselves upon the jury by putting *them* in prison!

In the great state trial of the Earls of Essex and Southampton before the English lords, barons, and judges, in which Sir Edward Coke and Francis Bacon—afterward the famous Lord-Chancellor—were counsel for the prosecution, running observations the reverse of complimentary were interchanged between some of the lords and the prisoners. Essex accused Coke of being a perjured liar, Bacon of being a hypocrite and time-server; and when Sir Walter Raleigh was sworn as a witness, asked: "What booteth it to swear the fox?" Once the lord high steward attempted to stop what he called these "expostulations," but without success. The French embassador at the court of St. James, who was an eye-witness of the trial, in writing to a member of his own Government, and speaking of its final scenes, says: "Shortly afterwards, the counsel ended

their pleadings, and the peers their biscuits and beer. For while the earls and the counsel were pleading, my lords *guzzled* as if they had not eaten for a fortnight, smoking also plenty of tobacco. Then they went into a room to give their voices; and there, stupid with eating, and drunk with smoking, they condemned the two earls."

More recent trials, in which the brazen vulgarity and buffoonery of the prisoners gave the scene the appearance of a light comedy, or in which the bias and bad temper of the judge and the insolence of the counsel struggled for the mastery (as in the criminal trial of the Tichborne claimant), could be brought to light, were the bad features of the trial we are discussing to be made better by such comparisons, but they are not. If the Court in this instance failed to secure order and decorum in the trial, through a mistaken notion of its power and duty (and this is the head and front of its offending, if it has offended at all), the answer of "*tu quoque*" to its critics, foreign or domestic, will not excuse it to that public sense which demands of courts of justice that they shall be objects of awe and fear to the guilty, and of reverence and hope to the innocent.

The administration of justice—which is the application of the law to ascertained facts—will not, in general, be successful in the best degree when the halls of justice become places of disorder, cross-talk, taunts, and quarrels, or of those displays of buffoonery and coarse wit that are supposed to make third-class theaters popular. In such an atmosphere there is danger that judges, jurors, witnesses, and counsel may forget that for the truth and uprightness of their conduct of the cause they have invoked the help, and, if they deserve it, the vengeance, of the Most High.

Few things can be more essential to the welfare of a people whose rights are secured and regulated by law than the dignity and intelligence of its administration, and nothing is more clear than that public confidence, respect, and reverence for the tribunals of justice cannot be lost without incalculable injury, even if such tribunals are in truth learned and pure. Order, dignity, and solemnity, particularly in criminal trials, are among the most influential of the causes that command public respect, and they, therefore, ought to be practiced and insisted upon to the uttermost possible extent consistent with the fundamental securities for freedom and fair play in the defense of persons accused

of crime. All this, doubtless, most intelligent persons will concur in agreeing to at once. They naturally, then, inquire why it is that in this great trial so much that was other than orderly, dignified, and solemn has happened without being prevented or punished by the presiding judge.

In considering this question, we must remember that the most of what was unseemly came from the accused himself.

It has been a cardinal doctrine in countries in which the right of self-defense against criminal accusations, for the security of life and liberty, has been recognized, that the accused cannot be tried or condemned without his personal presence, or without having actually answered the charge made against him. So, under the earlier common law, if the accused refused to plead, no further step could be taken in his trial, and he was put to torture to compel him to say whether he was guilty or not. Later, a more humane provision took the place of this, in treating a refusal to plead as a plea of not guilty, and proceeding with the trial. In our own Constitution it was provided, in Article 6 of the amendments, that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Under this provision, it is obvious that the trial of no person accused of high crime (to say nothing of others) can lawfully go on without his personal presence, and that he cannot be deprived of the right of speaking in his own defense. Counsel are merely the agents and assistants of their client, and if he chooses to speak for himself, their functions are for the moment suspended. It is well for liberty and innocence that this is so, for if we once admit that a trial can go forward either in the absence of the accused or when he is denied the right of self-defense, one of the greatest safeguards against malice, tyranny, and oppression is destroyed, and in evil times the power either to proceed without the presence of the accused, or to send him out of court for any cause, or gag, or otherwise keep him silent, might be used so as to pervert the courts of justice into engines of the most wicked

and dreadful tyranny and oppression. Consistently with the free exercise of these rights, there exists the plain power of the Court to regulate the order of its proceedings; to determine the number of counsel who may speak; how many speeches may be made on each side; and to fix limits of time, etc. Thus, if only two speeches on a side are allowed, and the accused insists upon addressing the jury, for instance, in his own behalf, it is competent for the Court to count that as one of the limited number of speeches allowed, and put the prisoner to his election whether he will speak for himself with one counsel, or allow both his counsel to speak for him, and keep silent himself.

The constitutional provision we have quoted was the outgrowth of the experience of history, and it was designed to put it beyond the power of either the executive, the legislative, or the judicial bodies of the country to exercise any discretion upon the subject. When, in times of peace and good government, a case of gross crime occurs, we are quite too apt to be impatient of the restraints and securities thrown by law around the administration of justice, and cry out for speedy justice regardless of forms and methods, forgetting that the righteous indignation of to-day may be, and too often is, the wild prejudice of the mob or the corrupt or bold act of the tyranny of to-morrow, and that a just public opinion in one case, if allowed to have sway, becomes the facile and fatal precedent and temptation for the grossest injustice in another. To depart, therefore, even in what seems the plainest case, from the systematic and orderly procedure of the law on account of our unanimous belief in the enormity of the offense, in order to accomplish a quick retribution for a great crime, is only, in principle and in fact, the resort to popular opinion as the test of crime and punishment in a particular case, and to stand really upon the same ground—only different in degree—as those who, in the case of Guiteau, have attempted to take his life by private violence. Does any one wish to go back to the institutions, if they can be called such, of five hundred years ago, when the tenure of every man's life and property depended upon the popular temper of the hour, or upon the mere will of a king or magistrate? Surely not. Then we must, with patience, bear the law and follow the law at whatever sacrifice of our opinions of its operation in a particular case.

Assuming Guiteau to have been sane, what could have been lawfully done by the Court to compel him to conduct himself

during the trial in a decent and orderly manner? The power of courts to punish contempts (and disorderly conduct is contempt) by parties, witnesses, counsel, and audience is undoubted, but "cruel and unusual punishments" are forbidden. Fine and imprisonment, therefore, would seem to be the only punishment for contempt of court. If, then, a prisoner like Guiteau, in a capital case, be sentenced to imprisonment for contempt, what is to become of the trial? Is it to be adjourned for a week, or a month, or a year, until the sentence shall have been executed? If so, would not most prisoners who thought themselves in danger of the gallows apply themselves with persistent diligence to misconduct in court, in order to go to prison for it, and thereby postpone the greater condemnation? Meantime, the jury must be kept together, and substantially imprisoned themselves, or the trial must be abandoned, at the risk of a plea by the prisoner, when it should commence again, that he had already been once put in jeopardy for the same offense. It must be apparent to every person of ordinary understanding that such a criminal trial cannot, practically, be delayed or abandoned in order to punish contempts. It must proceed to its regular end, however disagreeable the incidents of its course may be.

If such a trial could lawfully go on while the accused was lying in jail (perhaps during the whole trial) for supposed and adjudged contempt, of course the trial could flow peacefully on, and reach an early conclusion, but the right of rights of the accused to be confronted with his accusers and the witnesses, and to be heard in his own defense, is denied. True, it has once (and perhaps oftener) been said that the prisoner who misbehaves in court by violent disturbance *waives* this right. To say that he *forfeits* it, would be a more accurate expression, for the nature of a waiver is voluntary, and in such cases as these, the accused does not say, "I dispense with my right to attend the trial and confront the witnesses, and assent to spending the time in jail"; he says, on the contrary, that he *insists* on being present and being heard. If such conduct were naturally a waiver or a forfeiture of these rights, it is not easy to see how constitutional and intrinsic rights of this character can be waived or forfeited consistently with the cardinal objects of the Constitution itself. If he can create a waiver by implication drawn from misconduct, he can certainly waive his rights directly and without misconduct. Can he waive a trial by a jury

of twelve men, and consent to a trial by six or one, or by the Court? Can he waive an indictment, and consent to go to trial on the accusation of the prosecuting officer alone? And a constitutional right cannot be forfeited. If he could so waive or forfeit his rights, the question whether he has in fact done so must, in the nature of things, be determined by the opinion of the judge, and so, all these sanctions for life and liberty that have sprung from dear experience, and have become imbedded in English and American jurisprudence, depend practically upon the will of the judge only! If this be true, the accused, in a capital case, can be delivered or put to death with or without the proceeding the law commands, according as the judge may think the proprieties of the case warrant. No Roman tyrant ever claimed a greater power, and the Inquisition never exercised one more arbitrary or dangerous. The forms and securities of the law must be applied in the trial of the greatest criminals as rigidly as in that of the most innocent citizen. We cannot decide in advance which is the guilty and which is the innocent; if we could, there would be no need of courts of justice at all. Is it not far better, then, to bear the evils of disorderly behavior by those on trial for crime, than to recognize any power in a judge to banish the accused from the court and proceed without him, or close his mouth against the utterance of evil words? It is, no doubt, true that the judge has the power to punish such contempts by a sentence not cruel and unusual, to be executed during the daily recess of the court, such, for example, as solitary confinement, etc., from the adjournment of the court to its next opening; and, in most cases, such a course would be likely, if steadily followed up, to stop the misconduct. It would seem to be clear, also, that if a prisoner on trial should resort to physical violence, he could be physically restrained as much as if he attempted to run away. But suppose he only makes a disturbance with his voice, is he to be gagged? The accused has the right to make a defense, and this is a right that belongs to him personally. He need not exercise that right, for it is plain he may plead guilty, or stand absolutely mute; but the question is, can he be deprived of this right as a punishment for contempt of court? Could the legislature of a single State be persuaded to declare by law that the right of self-defense by one's own mouth against a criminal charge should in any instance depend upon the opin-

ion of a judge as to the conduct of the accused? And if the prisoner is gagged, for how long is it to be? Until the most critical part of the trial is passed?

It will be seen from these few queries and suggestions, out of many that could be made, that the whole matter is one of opposing considerations. On one side are the great and fundamental securities of life and liberty for all men and all cases. On the other are the convenience and importance of decency, order, and dignity in the administration of justice. In such cases as we have in view, one or the other of these must, to a greater or less degree, give way. Which, on the whole, should it be? It seems to us that the path of safety lies in holding fast to the first. To do otherwise might, in troublous times, make our system of criminal procedure substantially like that of France and other countries of Continental Europe (or what they used to be), and subject innocent persons who are obnoxious to the Government to a trial in which they cannot be heard, or to condemnation in their absence.

When in criminal trials insanity is set up as a defense, dealing with disorderly conduct of the prisoner consistently with the fair and even-handed course of justice would, even if the field of discretion were open to the judge in any case, be much more embarrassing. The presence of the accused and the allowance of free scope to his speech might be of the greatest value in determining whether he was really insane or was feigning. If insane, he could not be guilty of a contempt of court, and of course could not be lawfully punished for his disorderly conduct. Sentence to punishment for contempt, therefore, would, so far as the judge was concerned, prejudge the very question at issue; and to treat the accused as a madman would be equally bad, and tend to accomplish the object of the defense. Hence any action of the Court in such a case beyond restraining physical violence would seem to require the adoption of one of two opposing hypotheses, either of which, if carried to its logical result, should end the case The fact that the prisoner insisted on his own sanity would not relieve the embarrassment, for really crazy men do that very frequently.

From whatever point of view, then, we examine the course of the late trial of Guiteau, the difficulties, both practical and theoretical, in dealing with the prisoner's violence and unseemliness of speech are seen to be great; and the more we reflect upon the

subject the less disposed we shall be to condemn the failure or omission of the judge presiding at the trial to cause the prisoner to be either chained, whipped, gagged, or removed from the presence of the jury and witnesses during any part of the trial. Possibly a commitment to solitary confinement during a recess, as punishment if sane, and as discipline if not sane, might be lawful. The counsel, the right to whom the Constitution secured him, were not his substitutes. They were, in the language of the Constitution, to give him "assistance," and their presence would not deprive him of the right existing before the Constitution to speak in his own defense, subject to the limitations we have already mentioned; and it is of infinitely greater consequence to the safety of society that such rights should be preserved unconditionally than that there should be no insolent disorder or wicked speeches by a person accused of a great crime.

Long experience has shown that instances of evil or constant speaking by a prisoner on trial, of a really serious and obstructive nature, are very rare, and they have never defeated, though they have sometimes obstructed, the course of justice.

That it was fully within the competence of the Court in this late case, as it is in all other cases, to compel absolute decorum in the conduct of the persons attending the trial, is beyond all question, and we think it is to be regretted that this was not done to a greater degree than appears to have been the case. If, after a reasonable warning, the Court had made one or two examples of persons guilty of disorderly or indecorous behavior, by sentencing them to proper imprisonment for contempt, all demonstrations on the part of the audience would doubtless have ceased, and the public would have been taught the valuable lesson that courts of justice are not theaters, where the acting is to be applauded or condemned, as it may strike the various tempers of the beholders.

Nothing is more deeply interesting to a people, or more intimately connected with their welfare, than their penal codes and their procedure in criminal cases. It may be said, with substantial accuracy, that where the criminal laws of a country are anything like humane and complete, and when they are administered fairly, all civil and social rights are in general secured. When crimes are carefully defined and punishments fixed with precision, and with adequate relation to the degrees of the enormity of the offenses, property—including the rights of labor as

well as of accumulated capital—is secure, contracts are enforced, progress is developed, and intelligence prevails. But the converse of this does not appear to be true. The Roman civil law was carried to a high degree of philosophical and practical perfection, while the Roman criminal law and its administration continued to be, in many aspects, simply atrocious; and the same was, to a considerable extent, true of the systems of Continental Europe and even of the common law of Great Britain in its earlier history. A large and dangerous proportion of all offenses was drawn into the fatal vortex of treason, and while the ruler, or, in republican times, the assemblies of the people, by whatever name they were called, were the tribunals, the safety of those who were the objects of dislike or prejudice was at all times precarious. Every reader of history knows how tremendous and fearful were these engines of oppression; and, indeed, those accused of offenses otherwise classified stood little chance of that free, open, and deliberate justice that is now the chief glory of the most highly civilized countries. The often quoted passage in Tertullian: "If the Tiber overflow its banks; if there be a famine or a plague; if there be a cold, a dry, or a scorching season; if any public calamity overtake us; the universal cry of the populace is, 'To the lions with the Christians,'" illustrates, not only for Rome but for all countries, the insecurity of society when the criminal laws are not based upon precise and solid foundations, or when criminal procedure is not placed above the discretion of both the ruler and the judge, and beyond the immediate reach of the fluctuations of public opinion.

Happily, in our own country, treason is declared in the Constitution to consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort. Codes in regard to crimes are established by written law, and just and deliberate procedure is made applicable to all alike. All this, founded upon our knowledge of the terrible evils of looser systems, is not brought into play for the protection of criminals, but as the indispensable shield of innocence. It is to withdraw the question of the existence of guilt, alike from the influences of the tyranny and corruption of rulers and from the tumults and passions of the people. This is all that human agencies can do in these respects for good government. And if sometimes by means of it the guilty escape punishment, it almost always operates for the preservation of the innocent. And if it

occasionally happens that the immunities of those charged with crime are abused to the extent of disturbing our sense of what is decorous in the administration of justice, there is no reason that the infinite benefits of our constitutional system should be jeopardized by even the least appearance of an invasion of fundamental rights, for, as Dr. Lieber says: "One of the main ingredients of civil liberty, and at the same time one of its greatest blessings, is the protection against individual passion, violence, views, opinions, caprice, or well-meant but disturbing interference—the supremacy of law."

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